Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

British Columbia Maritime Employers' Association,

employer,

and

International Longshore and Warehouse Union–Canada; International Longshore and Warehouse Union Ship & Dock Foremen, Local 514,

bargaining agents.

Board File: 28446-C
Neutral Citation: 2011 CIRB 566
January 21, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. H. Allan Hope, Vice-Chairperson, and Messrs. John Bowman and André Lecavalier, Members, pursuant to section 107 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). A hearing was held on December 13, 14 and 15, 2010, in Vancouver.

Appearances

Mr. Israel Chafetz, Q.C., for the British Columbia Maritime Employers' Association; and
Mr. Bruce A. Laughton, Q.C., for the International Longshore and Warehouse Union–Canada, and the International Longshore and Warehouse Union Ship & Dock Foremen, Local 514.

These reasons for decision were written by Mr. H. Allan Hope, Vice-Chairperson.

I–Introduction

[1] This matter arises out of an initiative taken by the Honourable Lisa Raitt, Minister of Labour, in response to Notices of Dispute filed on November 2, 2010, with respect to collective bargaining for the renewal of separate collective agreements between the International Longshore and Warehouse Union–Canada (Longshoremen) and the British Columbia Maritime Employers' Association (the BCMEA), and the International Longshore and Warehouse Union Ship & Dock Foremen, Local 514 (Foremen) and the BCMEA. The following day, November 3, 2010, the Minister referred a question and gave a direction to the Board pursuant to section 107 of the *Code*. A copy of the Ministerial referral and direction is attached to this decision as Appendix 1.

[2] The BCMEA is an employers' association representing approximately 62 ship owners and other types of maritime and longshore employers with operations in British Columbia. Approximately 16 of the member employers directly employ longshore personnel. This subgroup of employers is often referred to as the Direct Employers. One of the Direct Employers is TSI Terminals Systems Inc. (TSI).

[3] Historically, collective bargaining in the West Coast Ports has been conducted on an industry-wide basis. The BCMEA has acted as the employer bargaining agent on behalf of its individual member companies with the bargaining agents representing each of the Longshoremen and the Foremen. The collective agreements applicable to these bargaining units expired March 31, 2010. Collective bargaining for their renewal had been ongoing between the BCMEA and the two unions for some time, when the Notices of Dispute were filed on November 2, 2010.

[4] The Notices of Dispute were restricted to TSI as an individual employer. For its part, the BCMEA protested what it saw as an attempt to isolate TSI as an individual employer.

[5] In terms of this dispute, the operative extract from the Minister's referral reads as follows:

> On November 2, 2010, I received a notice of dispute respectively from ILWU (Foremen) and ILWU (Longshoremen) in connection with the renewal of revision of their collective agreements with TSI Terminal Systems Inc. (see attached).

> Section 107 of the *Code* provides that I, as Minister of Labour, may refer any question to the Board where I deem it expedient or likely to maintain or secure industrial peace and to promote conditions favourable to the settlement of industrial disputes or differences.
>
> Given that the longshoring and other federally-regulated industries specific to port operations on the West Coast are crucial to the export and import of commodities, crucial to domestic supply of goods and crucial to the functioning of the Canadian economy, I am referring to the Canada Industrial Relations Board the question whether there has been a contravention of section 50(a) of the *Code* by either of the parties to bargain collectively in good faith and make every reasonable effort to enter into a collective agreement.

[6] On November 5, 2010, the BCMEA directed a letter of protest from Mr. Mike Leonard, its Vice- President of Labour Relations, to the Minister. It also filed Notices of Dispute on behalf of all of its 62 members with respect to both the Longshoremen and Foremen. The Minister's role in the dispute continued to evolve coincidental with her referral. On November 17, 2010, she advised the Chairperson of the Board in part as follows:

> Today, I appointed a conciliator to confer with the parties and endeavour to assist them in entering into or revising collective agreements. While the conciliation process will go forward, I will be awaiting your timely decision on my November 3rd referral.

[7] The Board dealt with the Ministerial reference in accordance with its expedited process, as a priority matter. The Board invited the parties to file written submissions with respect to the issues raised by the Ministerial reference. In its submissions, the BCMEA initiated an allegation that both unions had acted in breach of section 50(a) of the *Code*. The unions disputed these allegations and denied there had been any breach of the duty to bargain in good faith or any violation of section 50(a) of the *Code*.

[8] The BCMEA's allegations were detailed in a November 9, 2010, submission in which it provided particulars of what it characterized as the failure of the unions to bargain in good faith. It alleged that the unions' conduct demonstrated that they had failed to make every reasonable effort to enter into a collective agreement. Those particulars read as follows:

> a. Longshore resiled from agreements made at the bargaining table.
>
> b. Longshore cancelled or cut short prescheduled bargaining dates.
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> c. Longshore could not explain their own bargaining proposals which resulted in further delay.

d. Longshore and Foremen would not engage in any meaningful dialogue or investigate the possibility for compromise.

e. Longshore provided incorrect documents to the mediators wrongly claiming it had previously been given to the BCMEA.

f. Longshore and Foremen attempted to marginalize the BCMEA as bargaining agent by initiating a negotiation process directly with a member company.

g. Longshore attempted to scuttle the arbitration process by putting forward a proposal that would insure the failure of mediating an acceptable arbitration structure.

h. Longshore proposed to expand its jurisdiction which is not available in law.

i. Foremen would not engage in a mediation process to set a structure for arbitration.

j. Foremen fostered an atmosphere of intimidation and threats that was counter-productive to engagement at the bargaining table.

[9] The BCMEA did not pursue points (c) and (e) at the hearing before the Board. An additional point was added regarding the Foremen. It was alleged that the Foremen repeatedly challenged the makeup and authority of the employer's negotiating committee during collective bargaining.

[10] On November 26, 2010, the Board conducted a case management conference (CMC) in which it was agreed that the BCMEA would proceed first. A hearing was scheduled to commence on December 13, 2010, with a prospective duration of four days.

[11] The hearing did proceed on three consecutive days, December 13-15, 2010. The BCMEA called only one witness, Mr. Leonard. The Unions elected not to call witnesses. The bulk of the evidence adduced by the parties was in documentary form. In particular, the BCMEA filed multiple documents as Exhibit 1 and the Unions filed a similar compendium of documents as Exhibit 2, which outlined the positions, conduct and progress of the parties throughout the various stages of the 2010 collective bargaining process. These documents also addressed the mandate, efforts, reports and recommendations of the various mediators appointed by the Minister to assist the parties to reach a collective agreement or to negotiate the terms of reference for an arbitration process.

[12] In the hearing, the BCMEA placed considerable emphasis on the issuance by the Unions of the Notices of Dispute respecting TSI only. In effect, the BCMEA saw that action as an attempt by the

Unions to subvert the process of collective bargaining in terms that constituted in and of itself a failure to attempt to achieve a collective agreement.

II–Background and Context

[13] Before turning to the specifics of the conduct of the parties at the bargaining table, it is necessary to provide some background and context to the circumstances surrounding the 2010 negotiations, because, as the Board's jurisprudence makes clear, context is a very important feature of any assessment of allegations of a breach of the duty to bargain in good faith. The Board must look at the total collective bargaining picture and the entire relationship of the parties involved: *Canadian National Railway Company (1993)*, 93 di 69 (CLRB no. 1041).

[14] It is generally recognized and not disputed here that the Asia Pacific Gateway, and the movement of goods through the Canadian West Coast Ports, is of great value and strategic importance to the Canadian economy. It is highly important to ensure the continuous flow of goods through the ports and any disruption or threat of disruption or work stoppage can have a significant negative effect of Canada's economy and international reputation, as shippers redirect their goods through other, and likely American, ports further down the coast. Consequently, in order to protect this public interest, the historical tendency in this industry has been for the federal government to intervene, through Ministerial or legislative action, to resolve or prevent any prolonged labour disruption in the ports. Accordingly, collective bargaining is conducted in an atmosphere where the real threat of strike and lockout is reduced and where the threat of government intervention and an order for binding arbitration is pervasive. The parties thus develop their bargaining strategies and conduct themselves with this reality in mind.

[15] Notwithstanding the above, it is not impossible to achieve a collective agreement through free collective bargaining without a work stoppage, and without government intervention, as had been done in the previous round of negotiations.

[16] Much of the background of this particular set of negotiations is set out in the Minister's referral to the Board itself and is confirmed through the documentary and oral evidence submitted. The

collective agreements in question expired March 31, 2010. Notice to bargain was given by the unions to the BCMEA and to each of the employers on November 25, 2009. Bargaining began in January 2010.

[17] On March 5, 2010 (before the agreements had even expired), the Minister of Labour appointed two mediators, the Honourable Ted Hughes, Q.C., and John Rooney, to assist the parties in their negotiations, by either reaching a collective agreement or agreeing to a dispute resolution protocol. The mediators were unsuccessful in both aspects of their mandate and a report containing recommendations was submitted to the Minister. A second appointment of a mediator was made on September 29, 2010, whose mandate was specifically to negotiate terms of reference for an arbitration process. This process also failed.

[18] The specific context within which these negotiations took place is also of import. All parties acknowledged the economic circumstances in which these negotiations were occurring, namely a fragile economic recovery in an increasingly competitive market.

[19] The general positions of the parties, as shown through the evidence, may generally be described as follows. The BCMEA made it clear that it wanted and needed to achieve certain significant and structural changes to the terms of the existing collective agreements, largely related to the manpower provisions. The BCMEA wanted greater control and flexibility over the methods of hiring and dispatching longshore personnel. Both unions were of the view that the collective agreements contained provisions that provided the BCMEA with sufficient flexibility in this regard and wanted to preserve and protect the gains they had made in previous rounds of bargaining. The unions further expressed the view that there were insufficient incentives offered elsewhere in the proposals to offset any concessions the union might consider.

[20] Concerning the issue of negotiating a dispute resolution protocol, the BCMEA clearly preferred a method of binding mediation/arbitration governed by public interest type criteria. The Longshoremen proposed a method whereby wages and existing benefits would be sent to binding arbitration together with any other items the parties mutually agreed to send. The remainder would be subject to the existing terms and conditions of the previous agreement. The Foremen essentially

refused to participate in these discussions, expressing the view that it preferred to continue to exercise its right to free collective bargaining in accordance with the processes set out in the *Code*.

III–Analysis

[21] Section 50(a) of the *Code* provides as follows:

> 50. Where notice to bargain collectively has been given under this Part,
> (a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall
> (i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and
> (ii) make every reasonable effort to enter into a collective agreement.

[22] In reviewing the allegations of the BCMEA, the Board sought guidance from the decision of the Supreme Court of Canada in *Royal Oak Mines Inc.*, 1 S.C.R. 369. In the majority decision, Cory J. wrote:

> XLII. Section 50(a) of the *Canada Labour Code* has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.
>
> (emphasis added)

[23] The BCMEA's allegations focussed on the second prong of the duty set out under section 50(a), alleging the unions had failed to "make every reasonable effort to enter into a collective agreement," thus engaging the objective standard for measuring the conduct and bargaining proposals in question.

A–Section 71 Notices of Dispute

[24] As indicated above, the BCMEA placed great emphasis on the specific act of the unions having filed a Notice of Dispute under section 71 of the *Code* in relation to only TSI, one of the many member employers of the BCMEA. The BCMEA asserts that this specific act of issuing those notices alone constituted a violation of section 50(a) of the *Code*. We will address that allegation first.

[25] According to the BCMEA, the unions' Notices of Dispute were specifically designed to circumvent the BCMEA, which was the acknowledged and agreed-upon employer bargaining agent, both historically and for these 2010 negotiations. The strategy, it was alleged, was to isolate one of the individual members and, thereby, divide and conquer. The BCMEA asserted that such notice was improper, illegal and highly destabilizing to the economic climate in the port and to the collective bargaining. The BCMEA further asserted that the unions, by acting in such a manner, were deliberately undermining the bargaining authority of the employer bargaining agent and that such conduct is clear evidence that the unions were not making every reasonable effort to enter into a collective agreement.

[26] The unions, on the other hand, asserted that they had a legal right under the *Code* to issue the Notice of Dispute in relation to one individual employer, since the BCMEA was only a voluntary, rather than a designated, employer association under the *Code*. Moreover, the unions asserted that their issuing the notices did not indicate evidence they had resiled from or destroyed industry-wide bargaining. On the contrary, they asserted that they saw it as a positive and practical step taken to gain movement and progress in negotiations that were unproductive and proving fruitless. The unions maintained that there was no evidence of any direct bargaining with an individual employer, industry-wide bargaining continued and is continuing, the BCMEA effectively blocked any potential adverse consequences to it from the notices issued and, in any event, how could one ever characterize a request for conciliation as a violation of section 50(a) of the *Code*?

[27] Bearing in mind the overall context and tenor of the 2010 negotiations, the Board is not persuaded that the issuing of the Notices of Dispute pursuant to section 71 by the unions, naming only TSI, amounted to a violation of section 50(a) in these circumstances.

[28] The Board accepts that, historically, collective bargaining has been conducted on an industry-wide basis and that the BCMEA has acted as the authorized employer bargaining agent on behalf of its member companies. The Board also accepts that this was the accepted protocol for this latest round of bargaining. However, it is equally true that the BCMEA is only a voluntary association and is not a designated employer under section 33 of the *Code*. It is also a fact that there exist separate certifications or separate voluntary recognitions for each of the individual employers. Accordingly, bargaining on an industry-wide basis is a voluntary rather than a statutorily-mandated process between these parties and thus cannot be forced by one party on the other without their consent. The Board has stated in the past that where joint bargaining is only voluntary, it is, for the most part, unenforceable: *Western Cablevision Ltd. (1986)*, 65 di 150 (CLRB no. 573). Consequently, it was not illegal or unlawful for the unions to have issued the section 71 Notices of Dispute naming only TSI.

[29] The Board is also not prepared to attribute, as the BCMEA urges it to do, all of the ill motives and adverse consequences described by the BCMEA, to the mere issuing of the Notices of Dispute naming TSI alone. Put in context, the evidence made it clear to the Board that this was a difficult round of bargaining with the parties entrenched in their respective positions. The BCMEA was strident in its position that it needed to achieve significant structural change and greater flexibility to manage the workforce and the workplace. The unions were determined in their position not to be forced into giving up the terms and benefits they had won over the years and believed the employers had sufficient flexibility already.

[30] The Board sees the unions' filing of the Notices of Dispute as little more than another bargaining tactic or strategy to induce a reaction and see where it would lead. The evidence is clear that the BCMEA, TSI and the Minister herself all moved quickly to ensure that industry-wide bargaining between the BCMEA and the unions would continue on course. The BCMEA filed its own Notices of Dispute under section 71 respecting all member employers, TSI expressly indicated

that it wished the BCMEA to represent it at bargaining, and the Minister then appointed a conciliation officer in response to the Notices of Dispute such that the industry-wide process of collective bargaining would continue. The Minister also made the referral to this Board.

[31] The evidence is also clear that the unions did not take any further steps toward bargaining directly with TSI or any action that would isolate TSI or any other individual member in the context of negotiations. The unions have continued to participate in the conciliation process with the appointed conciliation officer. Mr. Leonard conceded in cross-examination that none of the fears or anticipated consequences came to fruition.

[32] The BCMEA argues that even the attempt to isolate a single member for collective bargaining, whether or not successful, is sufficient to constitute a violation of section 50(a), as it was designed to undermine the authority of the BCMEA as the recognized employer bargaining agent. The Board does not agree that the filing of the Notices of Dispute, without any further action by the unions to follow up on that strategy, amounts to a violation in the circumstances. If the unions had chosen to ignore the responses of the BCMEA and TSI, and had pursued a course of action that attempted to bargain directly with TSI in the face of protests by the BCMEA, then a different conclusion may have been warranted. However, to be clear, that question is not before the Board and the Board makes no such ruling on that hypothetical scenario. Those are not the facts. The facts here are that the unions took no more steps in that direction and abandoned any attempt to pursue that strategy. In light of those facts, the Board finds that the unions' conduct in filing the Notices of Dispute naming only TSI did not in and of itself demonstrate a failure by the unions to make every reasonable effort to enter into a collective agreement, in violation of section 50(a) of the *Code* in the circumstances.

B–Cumulative Effect of Remaining Conduct

[33] The BCMEA's position with respect to the remainder of the union conduct particularized and set out above, is that the conduct described may not by itself amount to a violation of the duty to bargain in good faith, but that the cumulative effect of the conduct over the course of the collective

bargaining process demonstrates that the unions failed to make every reasonable effort to enter into a collective agreement.

[34] The unions, on the other hand, maintain that their conduct and bargaining proposals were evidence of hard bargaining in the face of significant demands by the BCMEA and that even the cumulative effect of their conduct did not cross the proverbial line so as to constitute surface bargaining or demonstrate a failure to bargain, in violation of section 50(a).

[35] Distinguishing between hard bargaining and surface or bad faith bargaining is no easy task and can involve having to weigh and assess not only conduct but motive, all within the general context of the history of collective bargaining between the parties and in the context of the particular set of negotiations. In *Maritime Employers Association*, 1999 CIRB 26, the Board described the task as follows:

> [51] Distinguishing between hard bargaining and bad faith bargaining is just as complex a matter as the negotiations themselves. Thus, not only must the Board consider the actions of the parties, the proposals put forward and the quality of the discussions, but it must also weigh the maturity and the evolution of the labour relations between the parties.

[36] The Board described the relationship between the parties in that case as follows:

> [52] In the instant case, this was not the first time that the parties have come together to bargain; they have a labour relations history that goes back more than 50 years. Both parties also admitted that the major gains in the present collective agreement were achieved through tough confrontation. Not only are these parties very sophisticated in their relations, but they also know how to use all the administrative, legal and legislative tools available to them to achieve their ends.

[37] Such description applies well to these parties. They have a longstanding relationship and are sophisticated parties to collective bargaining, with knowledge of all the bargaining tools available to them.

[38] A review of the evidence overall, placed in proper context, has not persuaded the Board that the unions were surface bargaining or refusing to make every reasonable effort to enter into a collective agreement. The evidence is clear that the parties had made little progress over the course of the initial

six-month period (January to June 2010) up until the issuance of the report of the first appointed mediators. Nevertheless, small steps were being taken, proposals were exchanged and explained and many meetings took place. Discussion was had as to the rationale for the various proposals on each side. The fact that both sides moved very little from their initial positions does not in itself indicate a lack of effort to conclude a collective agreement. Parties are entitled to act in their self-interest and take hard and firm positions so long as they do not act illegally or contravene acceptable standards: *Maritime Employers Association, supra*.

[39] It is not the Board's role here to judge the reasonableness of the parties' proposals or to interfere in the balance of power between the parties other than to address conduct that is illegal, contrary to public policy or otherwise amounts to bad faith: *Iberia Airlines of Spain* (1990), 80 di 165 (CLRB no. 796). Recognition must be given here as well to the fact that, as indicated at the outset, the parties are well aware that in the end, the right to resort to full economic sanctions of strike or lockout may well be denied by Parliament implementing back-to-work legislation.

[40] Moreover, it must be recalled that at the end of the first mediation process, both unions took the position that they were prepared to agree to and accept the mediators' recommendations, namely to roll over the terms of the existing agreement for a two-year term plus specified wage increases. All remaining outstanding demands would be removed from the table.

[41] While there was some evidence of provocative and intimidating behaviour on the part of the Foremen, some evidence of the unions cutting meetings short and the like, and even the admitted fact that the Longshoremen failed to sign off on an agreement reached on one particular article, this evidence was not compelling, even cumulatively, in establishing that the unions had crossed the line and bounds of hard bargaining such that they demonstrated a failure to make every reasonable effort to conclude a collective agreement.

[42] The BCMEA further alleged that the Foremen repeatedly challenged the makeup and authority of the BCMEA's negotiating committee. Little evidence was led on that issue directly, but it was apparent that certain concerns were expressed to the effect that the composition of the BCMEA's committee was different from prior years and that the Foremen were not happy with the changes. The

Board agrees that a party has the right to choose, with some limited exceptions, who it wishes to have at the bargaining table and there was no obligation on the BCMEA to name others to its committee. However, apart from certain complaints made to the effect that those at the table did not have sufficient knowledge and ability to discuss the issues in depth and to understand the unions' concerns, there was no evidence that the Foremen had taken any action to directly undermine the bargaining authority of the BCMEA's committee. The Foremen did not refuse to continue to participate in the negotiations or otherwise thwart the process because of the composition of the BCMEA's negotiating committee.

[43] The BCMEA also complained of the Longshoremen's attempt to overbargain and to sweep large groups of employees into the unit. This position taken by the Longshoremen at the table is of less significance when presented as a mere proposal, and one that was not taken to impasse. It is not illegal *per se* to table the issue as a proposal which could lead to a form of voluntary recognition, even though it may ultimately not be enforceable before the Board.

[44] Finally, the BCMEA complained of the conduct of both unions concerning their position and attitude taken toward the negotiations with the mediators in the attempt to negotiate or agree to a dispute resolution protocol that would result in a binding method of resolving any outstanding issues.

[45] In the Board's view, the negotiations for the renewal of a collective agreement were overshadowed by this additional aspect of the mandate of the appointed mediators, that required them to explore and assist the parties in agreeing to a dispute resolution protocol that would result in a binding method of resolution. The unions remained committed to achieving a collective agreement through direct negotiations without resort to binding arbitration; the BCMEA was skeptical that their demands could ever be reached through direct negotiations and saw the process of mediation/arbitration with criteria as the better overall solution both short- and long-term. The parties were at opposite ends of the spectrum on the issue, and that appeared to infect the tenor and content of the negotiations themselves.

[46] The BCMEA asserted that the Longshoremen's proposal, to refer wages and benefits to binding arbitration and any other issues only if both parties agreed, was a deliberate attempt to scuttle the

discussions, knowing it would be completely unacceptable. The BCMEA further asserted that the Foremen's refusal to even participate in the discussions with the second appointed mediator was a clear demonstration of a failure to bargain.

[47] The unions, on the other hand, maintain that this whole aspect of the mediations formed a separate issue and should be viewed separate and apart from the real process of collective bargaining. The issue was only put forth and initiated by the Minister herself. It was not a proposal tabled by either party. The unions had no obligation to discuss the issue or participate in that aspect of the mediation efforts, and thus, their conduct or position on this issue could not and should not be subject to the duty to bargain in good faith. Accordingly, their conduct respecting this aspect of the mediation process should not form part of the Board's assessment of its conduct in collective bargaining for purposes of this inquiry.

[48] It is clear on the evidence and to the Board that both parties are well aware of the impact of the threat of government intervention on the process of free collective bargaining in this industry, and the parties' respective abilities to negotiate and accomplish substantive changes to the terms of the collective agreements on their own. However, the question of whether it is or is not appropriate to have a legislated method of binding arbitration apply to collective bargaining in this industry is not for the Board to consider in the context of this matter, where the Board has been asked to assess the conduct of the parties to these existing collective agreements to determine if either has failed to make every reasonable effort to enter into a collective agreement. It is not for this Board to adjudge the relative merits of free collective bargaining versus a legislated process of binding arbitration to protect the public interest, in the course of assessing whether parties have complied with their duty to bargain in good faith under the *Code*.

[49] Presently, there is no legislation applicable to this industry requiring parties to submit their disputes to binding arbitration if unable to achieve a negotiated resolution. The Board is of the view that it was open to the parties to elect to continue in the process of free collective bargaining to conclude a collective agreement as provided for under the *Code*, and none of the parties were obligated to engage in bargaining for a process that would eliminate the right to strike or lock out unless both parties agreed to such a negotiated result. The Board is not prepared to find that a lack

of effort in reaching agreement on a process of binding arbitration amounts to a violation of the duty to bargain in good faith.

IV–Conclusion

[50] For all of the reasons set out above, the Board has concluded that the conduct of the unions upon which the BCMEA relies does not, even when considered cumulatively, amount to a failure to bargain in good faith, in the circumstances of this case. The incidents relied on by the BCMEA do not, in the Board's view, take the unions' conduct outside that of hard bargaining that fails in the face of an absence of any level of consensus.

[51] In the result, the Board concludes that the answer to the first question of the Minister's referral is no, there has not, in the Board's view, been a failure by either of the parties to bargain in good faith and make every reasonable effort to enter into a collective agreement and the circumstances do not amount to a contravention of section 50(a) of the *Code* by either of the parties. In the result it is not necessary to consider the second aspect of the Minister's referral with respect to remedy.

H. Allan Hope
Vice-Chairperson

John Bowman
Member

André Lecavalier
Member

Encl.: Ministerial referral of November 3, 2010

APPENDIX 1

Ministre du Travail Minister of Labour

Ottawa, Canada K1A 0J2

IN THE MATTER OF SECTION 107 OF THE *CANADA LABOUR CODE* (PART I – INDUSTRIAL RELATIONS) AND INDUSTRIAL RELATIONS IN THE WEST COAST PORTS BETWEEN THE BRITISH COLUMBIA MARITIME EMPLOYERS' ASSOCIATION (BCMEA) AND THE INTERNATIONAL LONGSHORE & WAREHOUSE UNION (ILWU) (Longshoremen and Foremen)

WHEREAS in November 2009, the ILWU gave notice to bargain to the BCMEA to commence collective bargaining for the purpose of renewing their collective agreements;

WHEREAS on March 31, 2010, the collective agreements expired for the ILWU 500 (Longshoremen) and the ILWU 514 (Foremen);

WHEREAS on March 5, 2010, I appointed the Honourable Ted Hughes and Mr. John Rooney under section 105 of the *Canada Labour Code* (the "*Code*") to act as mediators;

WHEREAS on July 30, 2010, the mediators released their reports on the mediation process that they conducted between March and July 2010;

WHEREAS the mediators' reports contained statements to the effect that the parties did not engage seriously on the substantial issues and only found agreement on minor matters;

WHEREAS I sent the reports to the parties on September 22, 2010, then met with the parties separately on September 24, asked them specifically how they intended to reach new collective agreements and neither party responded.

WHEREAS in a further effort to reach new collective agreements, I appointed another mediator on September 29, 2010 under section 105 of the *Code*, to assist the parties in negotiating and drafting terms of reference for an arbitration process which approach also failed;

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WHEREAS Section 107 of the *Canada Labour Code* (Part I – Industrial Relations) provides that as Minister of Labour, where I deem it expedient, I may do such things as seems likely to maintain or secure industrial peace and to promote conditions favourable to the settlement of industrial disputes or differences, and to those ends I may refer any question to the Board or direct the Board to do such things as I deem necessary;

And WHEREAS the longshoring and other federally-regulated industries specific to port operations on the West Coast are crucial to the export and import of commodities and the functioning of the Canadian economy.

NOW THEREFORE, I, as Minister of Labour, pursuant to section 107 of the *Canada Labour Code*, hereby

(a) refer to the Canada Industrial Relations Board the question whether there has been a contravention by the parties of section 50 (a) of the Code to bargain collectively in good faith and ,make every reasonable effort to enter into a collective agreement; and,

(b) direct the Board to either impose a new collective agreement on the parties or impose a binding method of resolving outstanding terms of the collective agreements, if the Board determines that such contravention did occur.

IN WITNESS WHEREOF the Minister of Labour has hereto set her hand this 3rd day of November, 2010

Lisa Raitt

Minister of Labour